

Anna Utrata

University of Warsaw (Poland)

ORCID: 0000-0002-2970-9123

e-mail: autrata@diplomacy.pl

The Legality of the Restrictions of the Civil and Political Rights in Poland During the First Wave of the Coronavirus Pandemic

Abstract: This article aims to answer the question about the legality of the selected measures implemented by the Polish government during the first wave of the coronavirus pandemic, which resulted in constitutional rights and freedom restrictions. The study focuses on examining selected restrictions implemented in the spring of 2020 in the light of the Polish Constitution, especially in the light of Article 31 (3), which defines the premises of limitation of citizens' rights and freedoms. It indicates the lack of legal basis and incompatibility with constitutional premises of many restrictions. The study further examines the premises of the introduction of the state of emergency, indicating that the government's decision not to impose such a state was legal and why. The study considers legal status from March 13 to May 16, 2020.

Keywords: *pandemic, COVID-19, civil and political rights, state of emergency, legality*

Introduction

The impact of the coronavirus (SARS-CoV-2) has been felt globally since the beginning of 2020. As the first wave of the pandemic spread across Europe, various countries took legal action to restrain its effects, adopting diversified methods of coping with the public health threat.

In the spring of 2020, European citizens witnessed restrictions not yet seen by the youngest generation, as the situation in the world was unprecedented for the last few decades. Some measures the governments took included closing the borders, flight bans, compulsory quarantine, closures of schools and universities, and restrictions on gastronomy and tourism. Many democratic countries instituted those measures by introducing the states of emergency

provided for in their national constitutions. Others, like Poland, Denmark, and Sweden, have decided to implement new regulations by other means.

While the Polish government needed to adopt various legal measures to address the threat posed by COVID-19, the legal tools and procedures must be carefully assessed, and the conclusions for the future must be drawn.

The purpose of this article is to answer the question of the legality of the selected measures taken by the Polish government, resulting in selected civil and political rights restrictions, during the first wave of the coronavirus pandemic.

The study analyses selected restrictions implemented in the spring of 2020 in the light of the Polish Constitution, especially Article 31 (3), which defines the premises of limitation of citizens' rights and freedoms, considering the legal situation from March to May 2020. Eventually, it examines the premises of the state of emergency, defined in the Constitution, trying to determine whether the government's decision not to introduce that state was legal. It will determine the answer to the following research questions: 1) whether the introduction of restrictions on civil rights and freedoms by the Polish government during the first wave of the epidemic was consistent with Polish law according to Art. 31 (3) of the Polish Constitution? 2) was the Polish government obliged to introduce a state of emergency, and if not, on what basis it could impose limitations on civil rights and freedoms?

The analysis presented in this paper has been carried out using linguistic, systematic, and objective interpretation of selected legal sources, commentaries and case law. However, its considerations do not exhaust the topic of the legality of all the limitations of citizens' rights and freedoms in the spring of 2020. Primarily, it does not consider the restrictions imposed on business activity due to the ongoing debate about the compensation to be paid to entrepreneurs at the time of writing. It significantly affects the assessment of the legality of the introduced restriction. The study should be treated as an outline of the subject and an inspiration for further research on the legality of imposing restrictions on civil rights and freedoms.

Article 31 (3) of the Polish Constitution – Premises of Legality of Restrictions

It is indisputable that citizens' rights and freedoms described in the Polish Constitution and the ratified international agreements and pacts are generally not absolute. For example, Article 4 (3) of the International Covenant on Civil and Political Rights allows temporary derogation of its articles „in the time of public emergency which threatens the life of a nation” to the extent strictly required by the situation¹.

¹ Provided the measures are not inconsistent with other international obligations and are not discriminatory. The State Party shall immediately inform other State Parties about the use of the right of

Premises of the constitutional laws and freedoms derogation on the ground of the Polish law have been described in Article 31 (3) of the Polish Constitution. According to it: „Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights”. Only fulfilling all three premises described by this article may lead to the conclusion that limitations proposed to citizens’ laws and freedoms are constitutional.

Following the provisions of the given article, there are three premises that the new law should fulfil to be consistent with the Polish Constitution and, therefore, legal. For the restriction to be constitutional, it has to be:

- 1) Established by the statute [an act of the parliament, authors note];
- 2) Necessary for the protection of one of the enlisted values: protection of states security or public order, protection of the natural environment, health or public morals or freedoms and rights of other persons;
- 3) Shall not violate the essence of freedoms and rights;

Only when all the listed premises are fulfilled the restriction is constitutional.

The first premise states that the limitation must be established by statute, the act of the parliament. Even though it seems indisputable, the premise to be fully understood must be read in the context of accepted doctrine and case law.

According to the judgement of the Constitutional Tribunal², it is permitted to limit constitutional rights and freedoms by a non-statutory act of law (regulation, decree), provided that the statute on which the regulation was based includes “all the essential elements of the legal regulation”. The Tribunal acknowledged that the statute has to “specify all the essential elements of the restriction of the particular right or freedom so that it is possible to designate the complete outline of the restriction [that will be implemented by a regulation, authors note], based on the statute’s text” (Garlicki & Zubik, n.d.)³. According to the doctrine, this means, that it is permissible to include the regulations which do not constitute the “essential elements of the restriction”, in a decree (Garlicki & Zubik, n.d.)⁴. It is important to note that this implies it is forbidden to limit constitutional rights and freedoms by a decree or a regulation in case there is no complete outline of the possible restriction included in the statute’s text. The Constitution forbids the limitation in that case, as it leads to the restriction of rights and freedoms to which the legislative body (Parliament) did not consent by the act of the executive body (e.g., Minister or Council of Ministers).

derogation. The full text of the International Covenant on Civil and Political Rights is available on <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> website

² The judgement of the Constitutional Tribunal from May 25, 1998, case no. U 19/97.

³ Commentary on the Art. 31.

⁴ Ibidem.

The second premise, mentioned in Art. 31 (3) of the Polish Constitution, indicates that the limitation to constitutional rights and freedoms must be necessary to protect the enlisted values. Once again, it is necessary to precise which values mentioned in Art. 31 (3) were invoked as the basis for the restriction of citizens' rights and freedoms in the spring of 2020 and what the "necessity" of the restriction means.

The legislation discussed in this comment was introduced to the public as necessary due to public health and states security endangerment. As Tuleja (2019) described in *The Constitution of the Republic of Poland. Commentary*: "health shall be understood as a lack of disease and a subjective feeling of wellbeing (...). Public health means the health of a larger number of people. The obligation to take care of society's health, specific groups, constitutes a fundamental state's obligation, in respect of which the constitutional rights and freedoms may be restricted (Constitutional Court ruling U 5/13)". Another value invoked by the authorities as the pandemic legislation basis is public safety, which should be understood after the Constitutional Court: "Public safety is a state, in which the basic freedoms and human rights are protected, e.g., life and health and the rules defining the constitutional axiology" (Constitutional Court ruling K 44/07)⁵.

There is no doubt that the coronavirus pandemic had posed and, at the time this commentary is being written, still poses a significant threat to public health and safety. According to the Constitution, it was legal to introduce new law restricting rights and freedoms enlisted in the Basic Law to protect the mentioned values. However, to entirely fulfil the second premise, the new law must be "necessary" to protect enlisted values, such as public health or safety.

According to the principle of proportionality, restriction of constitutional rights and freedoms has to be adequate to the purpose of the regulation (Marszałek-Kawa & Plecka, 2019). The Constitutional Tribunal explained in its ruling of February 26, 1993 that constitutional rights and freedoms restrictions must "each time take into consideration the necessity to balance the significance of the right or freedom being restricted and the weight of the right that is justifying the restriction"⁶. What is important is a "failure to retain the necessary principle of proportionality or the statement that the restriction is excessive in an unnecessary way, will result in the unconstitutionality of a given regulation"⁷.

The test of proportionality should be carried out to verify the compatibility of the regulation with the principle of proportionality and examine the constitutionality of the restriction. The test, developed and later confirmed by the Constitutional Tribunal⁸, consists of three questions:

⁵ The judgement of the Constitutional Tribunal from September 30, 2008, case no. K 44/07.

⁶ The judgement of the Constitutional Tribunal from January 26, 1993, case no. U 10/92.

⁷ Ibidem.

⁸ The test of proportionality is wildly used also within international organizations such as the Council

- 1) Does the regulation have the potential to lead to the intended effects?
- 2) Is the regulation necessary to protect the public interest with which it is linked?
- 3) Are the effects of the regulation proportional to its burdens on the citizens?

Only when the answer to the previous question is positive, it is justified to continue to the next step of the test, as a negative answer to either of the questions fails the test of proportionality and illegality of the restriction.

In order to put the test of proportionality into the perspective of the coronavirus regulations, it is necessary to analyse each of the questions indicated by the Constitutional Court a bit more carefully and with the help of examples.

The first question is also known as the test of suitability. It aims to verify whether the regulation is purposeful. In other words, it verifies if a specific regulation may help achieve effects intended by the legislative body. An example of such regulation is the limitation of children's freedom of movement while unattended by an adult to protect their safety. However, the same regulation would not have met the proportionality test requirements if it aimed to improve children's health by providing them with more exercise.

The second question constitutes the test of necessity, associated with the principle of the mildest measure. The principle states that if there is more than one way to achieve intended effects, the legislative body ought to implement the measure which encroaches on an individual's rights and freedoms to the slightest degree. The principle thus implies that it is forbidden to implement a certain measure if it is possible to reach a goal by implementing a less severe one. An example of a regulation which does not meet the necessity test's requirements is a ban on motorised vehicles based on road safety protection, while it is possible to reach the same goal by implementing speed limits.

The last step of the proportionality test, inspected only when the answer to the previous two questions was positive, is the test of proportionality in a strict sense. At this stage, it is necessary to weigh the significance of two or more constitutional values – of the right or freedom being restricted and of the right or freedom being protected by implementing limitations. If the restricted right is more important than the other one, the restriction should be deemed illegal. An example of a regulation that does not meet the proportionality test in a strict sense is the restriction of economic activity without establishing appropriate compensation mechanisms (two values are weighed here: the protection of the public interest and individual interest).

Finally, the third premise in Art. 31 (3) of the Polish Constitution states that the restriction to the constitutional rights and freedoms shall not violate the essence of those rights or freedoms. As the Constitutional Court has stated: the “concept of the essence of rights and freedoms is based on the assumption that it is possible to extract some basic elements, within each right and freedom, without which the right or freedom cannot exist, as well as

of Europe, the European Union or the World Trade Organization, as well as by constitutional courts of many countries.

some additional elements, that may be deducted or modified by a normal legislative body, without the destruction of the identity of right or freedom”⁹. “Infringement of the essence of a right occurs in a situation where the introduced limitations concern the basic rights constituting the content of a given right and make it impossible for this right to perform the function it is supposed to perform in the legal order”¹⁰.

The Constitutional Court developed the concept of the “essence” in relation to specific constitutional rights, such as property law¹¹, freedom of assembly¹², right to social security¹³ and others.

Sources of Pandemic Laws and the Constitutionality of Restrictions

In the spring of 2020, Polish citizens have witnessed the implementation of many restrictions on their constitutional rights and freedoms. As a legal base for combating SARS-CoV-2, the Polish government indicated the Act on preventing and combating infections and contagious diseases of people from December 5, 2008. The Act put into Polish legal circulation institutions such as the “state of the epidemic” and the “state of the epidemic threat”. What is crucial in relation to the further part of this commentary is that the Act also enlists the Minister of Health and the Council of Ministers’ powers in combating epidemic threats. Remember that the legal situation on which this commentary is based concerns time from the beginning of March to May 16, 2020. These two months were crucial as they were the first two months of implementing extraordinary measures into the Polish legal system. They are especially interesting as no jurisprudence could influence – and limit – the COVID restrictions, as it did in a later time. The restrictions in this time were most severe and were implemented in a chaotic way, which provides interesting and important material for analysis.

The list of the restrictions which may be implemented by the regulation of the Minister of Health based on Art. 46 (4) of Act on preventing and combating infections and contagious diseases contains, *inter alia*:

- temporary restrictions on the mode of outdoor movement of citizens;
- temporary restrictions on the functioning of particular institutions or places of work;
- a prohibition from organising spectacles and other gatherings of people;
- temporary restrictions or bans on trading and use of particular objects;

The list of the restrictions that may be implemented by the regulation of the Council of Ministers includes, *inter alia*:

⁹ The judgement of the Constitutional Tribunal from January 12, 2000, case no. P 11/98.

¹⁰ The judgement of the Constitutional Tribunal from June 29, 2005, case no. P 8/99.

¹¹ *Ibidem*.

¹² The judgement of the Constitutional Tribunal from September 18, 2014, case no. K 44/12.

¹³ The judgement of the Constitutional Tribunal from June 16, 2021, case no. P 10/20.

- temporary restrictions of certain business activities in certain types of business;
- an obligation for individuals to undergo a quarantine;
- temporary restrictions on the use of specific venues and locations and an obligation to secure them;
- a prohibition from staying at certain places, objects or territories;
- a prohibition from leaving zone zero for infected people or people suspected of being infected¹⁴;

Bearing in mind, what was said about the legal basis of constitutional rights and freedoms restrictions, and the scope of statutory authorisation of the Act on preventing and combating infections and contagious diseases, I try to shortly analyse the legal basis of selected limitations to the citizens' rights and freedoms implemented on Polish population between March and May 2020. In order to do so, I present below chosen (especially controversial) restrictions implemented by the Minister of Health and the regulations of the Council of Ministers and compare them with the authorisation included in the Act.

Under the Act of preventing and combating infections and contagious diseases in people, the Minister of Health implemented the state of epidemic threat on the territory of the Republic of Poland on March 13, 2020¹⁵. Only a week later, on March 20, 2020, the Minister implemented the state of the epidemic¹⁶. In these regulations, the Minister has exercised his powers indicated in the Act and, as the legal doctrine suggests, implemented restrictions not included in the Act's authorisation.

Some of the most important restrictions of the constitutional rights and freedoms implemented by the Minister in the spring of 2020 are:

- prohibition of organising spectacles and other public gatherings¹⁷;
- A prohibition of outdoor movement, with exception to the outdoor movement with purpose, enlisted in the regulation¹⁸ and a restriction of the mode of movement¹⁹;

¹⁴ The powers indicated in Article 46 and 46 b of Act on preventing and combating infections and contagious diseases, were implemented into legal circulation by Act on legal solutions associated with preventing, countering and combating COVID-19, other diseases and crisis situation triggered by them, from March 2, 2020. That act was revised eighteen times only from March to May 2020.

¹⁵ The regulation of the Minister of Health on the announcement of the state of epidemic threat on the territory of Republic of Poland from March 13, 2020.

¹⁶ *Ibidem*.

¹⁷ According to the regulation of the Minister of Health from March 24, 2020 par. 1 (6).

¹⁸ According to the regulation of the Minister of Health from March 24, 2020 par. 1 (2).

¹⁹ Limitation to the number of people travelling together and a limitation of the number of taken places in the public transportation; Implemented by the regulation of the Minister of Health from March 24, 2020 par 3 (2).

- A temporary restriction of certain business activities in certain types of business involving: sport, recreation, leisure, gastronomy, event planning, etc.²⁰;
- A temporary restriction of religious worship in public places, including buildings and other places of religious worship²¹;
- An obligation for individuals to undergo quarantine in some instances²²;

Confronting these restrictions with the Act on preventing and combating infections and contagious diseases of people, which is said to be the legal base for the restrictions, leads to the conclusion that when considering the legal basis of the restrictions, which states only one of three premises of the constitutionality of restriction, many of the restrictions implemented by the Minister of Health, were illegal from the constitutional perspective.

This paper points out only a few apparent transgressions of the authorisation included in the Act.

Firstly, a prohibition of an outdoor movement was implemented in the Minister's regulation, even though the Act indicates that the Minister may only temporarily restrict a mode of an outdoor movement, not prohibit it entirely, apart from a few exceptions enlisted in an Act. Such prohibition violates Article 52 of the Polish Constitution, which guarantees the freedom of movement on the territory of the Republic of Poland. Any restrictions to constitutional freedom have to have a statutory basis, or the statute has to include the complete authorisation (statutory delegation), indicating which right, to what extent, by whom and in which procedure can be restricted. If such delegation does not exist, the restriction is unconstitutional.

Secondly, according to the Act on preventing and combating infections and contagious diseases of people, only the Council of Ministers may impose the obligation on individuals to undergo quarantine. However, in the spring of 2020, that obligation was imposed on citizens by the regulation of the Minister of Health. Since the quarantine obligation contradicts the freedom of movement from Art. 52 of the Polish Constitution, the restriction has to meet the requirements of Article 31 (3) of the Polish Constitution. Because of the lack of proper statutory basis (the Act authorises the Council of Ministers, not the Minister of Health, to impose such restriction), the restriction must be deemed illegal.

The same defect affects the authorisation of the *Act on preventing and combating (...)* to impose restrictions on certain business activities in certain types of businesses. Even though the Act states that the restrictions in this area may only be implemented by the Council of Ministers, in the spring of 2020, such restrictions were implemented by the Minister of

²⁰ According to the regulation of Minister of Health from March 13, 2020 par. 5 (1) and the regulation of Minister of Health from March 20, 2020 par. 6 (1) 1.

²¹ According to the regulation of Minister of Health from March 13, 2020 par. 5 (1) 1) and the regulation of Minister of Health from March 20, 2020 par. 6 (4).

²² According to the regulation of Minister of Health from March 13, 2020 par. 2 and the regulation of Minister of Health from March 20, 2020 par. 2.

Health (only later were they repeated in the regulation of the Council of Ministers). Lack of statutory basis, in the sense of lack of proper authorisation, results in the unconstitutionality of the restriction.

The last example is the restriction of religious worship in public places. Even a careful examination of the Act of preventing and combating infections and contagious diseases does not result in finding any authorisation to restrict the freedom of religion contained in Art. 53 of the Polish Constitution, not only by the Minister of Health but also by a Council of Ministers. Even though, in the case of public worship, the restriction implemented by the Minister of Health is connected to the general limitation to the public gatherings, it has to have a legal basis based on the statutory authorisation. Since the Act did not authorise the government body to implement any restrictions on freedom of religion, the limitation, in such shape, should be considered unconstitutional.

Unfortunately, many of the legal arguments against the constitutionality of certain restrictions imposed by the Minister of Health apply to the regulations imposed by the Council of Ministers. Many of those restrictions repeat the restrictions imposed by the Minister of Health. However, the Council have imposed some additional limitations, but some do not have a proper legal basis.

Some of the most important restrictions to the constitutional rights and freedoms imposed by the Council of Ministers in the spring of 2020 are:

- A prohibition of an outdoor movement, with exception to the outdoor movement with purpose enlisted in the regulation²³ and a restriction of the mode of movement;
- A temporary restriction of certain business activities in certain types of business involving: sport, recreation, leisure, gastronomy, event planning, etc.²⁴;
- A temporary restriction of religious worship in public places, including buildings and other places of religious worship²⁵;
- A prohibition of organising public gatherings.

The restrictions not imposed by the Minister of Health are, *inter alia*:

- A prohibition of an outdoor movement without the company of an adult for children under 18²⁶;
- A prohibition on using the green areas and beaches²⁷;

²³ According to the regulation of the Council of Ministers from March 31, 2020, on the establishment of certain limits, orders and bans in connection with the epidemic state, par. 5 and later.

²⁴ According to the regulation of the Council of Ministers from March 31, 2020, par. 8; and later.

²⁵ *Ibidem*.

²⁶ According to the regulation of the Council of Ministers from March 31, 2020, par. 5; and later.

²⁷ According to the regulation of the Council of Ministers from March 31, 2020, par 17; and later; included using parks, park squares, zoos, botanical gardens, boulevards, promenades, etc.

- A prohibition of using the woods²⁸.

Once again, the comparison of the restrictions imposed by the regulations of the Council of Ministers with the provisions of the Act on preventing and combating infections and contagious diseases in people leads to the negative conclusions regarding the constitutionality of the legal basis of these regulations. Some restrictions imposed on citizens by the Council of Ministers have no legal basis at all, and in the process of implementing others, the Act's authorisation has been extended, which is unacceptable from the legal perspective. One should remember that the *Act on preventing and combating (...)* has been invoked as a legal basis for all the mentioned regulations of the Council of Ministers.

The Council of Ministers has extended a controversial prohibition of an outdoor movement without reason enlisted in regulation by adding the obligation of an adult company in reference to an outdoor movement of children under 18 years of age. The Act invoked as a legal basis does not authorise the Council of Ministers to restrict freedom of movement from Art. 52 of the Polish Constitution to that extent. The Act only authorises the Ministers to temporarily restrict the mode of outdoor movement, not the outdoor movement in general. The statutory delegation does not apply to the restrictions imposed by the regulation of the Council of Ministers, and thus such regulation is unconstitutional, as it exceeds the statutory authorisation.

The lack of legal basis concerning the restriction of the freedom of religion, included in Article 53 of the Polish Constitution, is actual in reference to the regulation of the Council of Ministers, prohibiting religious worship in public places. The Act on preventing and combating infections and contagious diseases in people does not authorise any government body to restrict this freedom. Yet, the Council of Ministers in the spring of 2020 implemented almost a total ban on participation in public worship, including masses and funerals. Bearing in mind that no right is absolute, the government body is obligated to function on a legal basis while restricting constitutional rights. In this case, it did not, as the Act does not authorise the Minister of Health, nor the Council of Ministers, to restrict the freedom of worship. Because of the lack of legal basis, such a limitation is unconstitutional.

Finally, it is important to examine the legal basis of the controversial prohibition of entering the woods. As the legal basis of that restriction, the Prime Minister has indicated Art. 2 of the Act on preventing, countering and combating COVID-19, other diseases and crises triggered by them, from March 2, 2020, under par. 17 (1) of the regulation of the Council of Ministers on the establishment of certain limits, orders and bans in connection with the epidemic state from March 31, 2020. The restriction was implemented by verbal order of the Prime Minister, addressed to the General Director of a State Forests. However,

²⁸ The process of implementing that restriction is worthy of a separate elaboration; due to the restricted volume of this commentary I will presume that it was implemented as a result of a Prime Minister's verbal order addressed to the General Director of State Forests, however the order has not been publicly announced.

the exact content of the order is unknown to the public. The first of the articles concerns the procedure of giving orders by the Prime Minister. The second one implements, above all, a ban on using the “green areas”, the definition of which can be found in the *Act on the protection of nature*. That definition does not include forests. What is worth noticing is that the premises to introduce a temporary prohibition of entering the woods are enlisted in Art. 26 (3) of the Act on woods from September 28, 1991, and do not include an epidemic of human diseases. Since, once again, it is impossible to indicate the statutory authorisation of such restriction, it should be treated as unconstitutional.

Assessing the legal basis of the restrictions imposed by the Minister of Health and the Council of Ministers is a procedure that substantially eliminates the discretion of an assessment. Many of the restrictions imposed on civil rights and freedoms in the spring of 2020 are legally questionable due to the lack of a proper statutory authorisation, which is obligatory according to Art. 31(3) of the Polish Constitution. Thus, those regulations should be deemed unconstitutional.

Testing the principle of proportionality and the “essence of rights” is much more complex and discrete. Like in the case of the legal basis of the restriction, the test of proportionality falls into the remit of the courts. However, it is also important to assess the procedures of imposing restrictions on civil rights and freedoms from the theoretical perspective. Bearing in mind that the first wave of the pandemic was when the governments around the world faced an unknown threat, and it was inevitable that some implemented restrictions would face social discontent, the arguments against some restrictions are also justified from the legal perspective.

The prohibition of entering the woods is an example of such a restriction. As proven, the legal basis of this restriction is questionable. However, this controversial ban is especially interesting when assessed due to its “essence”, not only the implementation procedure.

To positively pass the test of proportionality, the restriction has to cause a positive answer to the three questions:

1. Does the regulation have the potential to lead to the intended effects?
2. Is the regulation necessary to protect the public interest with which it is linked?
3. Are the effects of the regulation proportional to its burdens on the citizens?

The Prime Minister has indicated public health as a value that the restriction aimed to protect by implementing this ban. When the ban was implemented, the freedom of movement was already restricted, and gatherings bigger than three people were banned. People spending time together were obligated to keep a distance of at least 1,5 m and wear protective masks.

Bearing that in mind, the answer to the first question, whether the prohibition of entering the forest could stop the spread of coronavirus, is questionable. Is it necessary for the protection of public health? While the rest of the restrictions are obeyed, there is no need for another restriction, which is somehow repetitive to the previous ones. In other words: it is unnecessary and does not pass the necessity test.

A ban on the organisation of public gatherings, which later became an absolute prohibition of public gatherings, must be evaluated in the same way as violating the premises of the principle of proportionality included in Art. 31 (3) of the Polish Constitution. Even though such regulation may lead to the protection of public health, when the ban was introduced, another, less strict measures were available to the authorities, meaning the prohibition was unnecessary. Measures, such as an obligation to maintain social distance and an obligation to wear protective masks, should protect public health while protecting the freedom to strike from Art. 59 of the Constitution.

The Basic Law provides a possibility for restriction of freedoms without fulfilling the premises from Art. 31 (3) and without the obligation of maintaining the “essence” of freedoms. However, from a legal perspective, it is possible only after introducing a state of natural disaster, which the Polish government did not introduce.

That decision is analysed from the legal perspective in the remainder.

State of Emergency

The last issue raised in this commentary is the state of emergency, or, to be precise, the government’s decision not to introduce such a state during the first wave of the coronavirus pandemic.

The Polish Constitution allows the government to introduce a state of emergency in a situation of particular danger when the ordinary constitutional measures are insufficient. One of the following appropriate extraordinary measures may be introduced: martial law, a state of emergency or a natural disaster. In those situations, the Constitution allows the relaxation of the requirements towards the premises of the legality of the restrictions of citizens’ rights and freedoms. In other words, it allows restricting those rights and freedoms without fulfilling the three premises from Art. 31 (3).

The Constitution enlists rights and freedoms that may be suspended due to the introduction of one of the states of emergency. According to Article 232 (3) of the Polish Constitution, in the state of natural disaster, rights such as freedom of business activity (Art. 22), individual liberty (Art. 41), inviolability of the home (Art. 50), the right to strike (Art. 59), freedom of labour (Art 65), right to rest (Art. 66) and other, may be limited, without the fulfilment of the premises from Art. 31 (3) of Constitution, if the state of natural disaster is introduced.

The decision of the Polish government not to introduce such a state has met the objection of the part of society that deemed it illegal. However, it is important to note that the lack of introduction of the state of the emergency, or to be more precise, the state of the natural disaster does not contradict Art. 232 of the Polish Constitution. It states that “In order to prevent or remove the consequences of a natural catastrophe or a technological accident exhibiting characteristics of a natural disaster, the Council of Ministers **may** introduce, for a definite period no longer than 30 days, a state of natural disaster in a part of or upon the whole territory of the State”. The authorisation enshrined in the Polish Constitution provides

the Council of Ministers with the possibility, but not the obligation, to introduce the state of the natural disaster when the premises are fulfilled. On that basis, the lack of introduction of a state of emergency cannot be considered illegal.

According to Tuleja, as he emphasises in *The Constitution of the Republic of Poland. Commentary*: “The phrases “may introduce” and “may extend” do not, however, imply full discretion in decision-making (...). Concerning the state of natural disaster, the Council of Ministers may assess the occurrence of the following premises: the need to prevent the effects of a natural disaster or technical failure, the occurrence of threats impossible to remove by ordinary constitutional means. When considering the necessity to apply special constitutional means, the Council of Ministers should consider the necessity to introduce limitations to freedoms and rights exceeding the limits set by Article 31 clause 3 of the Constitution. If these prerequisites are found, the Council of Ministers is obliged to introduce a state of natural disaster or apply for its extension” (Tuleja, 2019).

However, this is a controversial position, not shared by a significant part of the doctrine, and also not supported by the jurisdiction. It should be pointed out that the court decisions in cases involving restrictions on civil rights and freedoms in 2020 and 2021 were not based on the allegation of the illegality of failure to impose a state of disaster but on the allegation of violation of Article 31 (3) of the Polish Constitution²⁹.

In this context, the decision of the Polish government not to introduce the state of natural disaster (which on its own cannot be deemed illegal) shall be equivalent to the consent on fulfilling the premises of Art. 31 (3) when restricting civil rights and freedoms, enlisted in the Constitution. This article regulates the conditions under which the restrictions are considered constitutional when the state of emergency is not introduced. As long as one of the states of emergency is not introduced, the authorities are obligated to comply with the art 31 (3). Because they do not always manage to do so, the government should consider introducing the state of the natural disaster to legally interfere in citizens’ rights and freedoms. Because, according to the Art. 77 of the Polish Constitution, everyone has a right to “compensation for any harm done to him by any action of an organ of public authority contrary to law”.

²⁹ Inter alia: the judgement of the Provincial Administrative Court in Szczecin from August 5, 2021, case no. II SA/Sz 446/21; the judgement of the Provincial Administrative Court in Opole from September 16, 2021, case no. II SA/Op 332/21; the judgement of the Provincial Administrative Court in Gliwice from April 27, 2021, case no. III SA/Gl 33/21; the judgement of the Provincial Administrative Court in Warsaw from February 25, 2021, case no. VII SA/Wa 1847/20; the judgement of the Provincial Administrative Court in Lublin from November 5, 2020, case no. III SA/Lu 448/20.

Summary

The spread of the coronavirus was unexpected not only for citizens but also by governments of many countries around the world. The measures taken to prevent the spread of the virus are unprecedented in post-war Europe and Poland since the systems change.

The Polish government decided not to impose a state of emergency (state of a natural disaster) to combat the spreading epidemic. This political decision was consistent with the Polish legal order (and with Constitution on its own), and only some doctrinal representatives believed that the government was obligated to introduce such a state. However, this decision meant that when restricting civil rights and freedoms, the authorities could not “exempt” themselves from the obligation to impose restrictions under Article 31(3) of the Polish Constitution. It means that any restriction imposed disregarding the grounds outlined in this article should be deemed illegal under Polish law, even if the “state of an epidemic” has been declared.

In this context, it should be pointed out that the restrictions to the citizens’ rights and freedoms, although implemented mainly in good faith and often necessary, have often been proceeded unconstitutionally and should be deemed illegal.

The process and the timeline of implementing subsequent restrictions were chaotic and non-transparent. For an average citizen, keeping up with the ongoing regulatory changes was impossible, which violated the principle of trust in the state and the law.

Another legal problem with the implementation is the lack or flaw in the legal basis required by Art. 31 (3) of the Constitution. Although the regulations were implemented by the Minister of Health or the regulations of the Council of Ministers, some of them did not have a statutory authorisation at all, or the authorisation is flawed. Due to the obligation to implement constitutional rights and freedoms by the statute, such a lack of statutory authorisation causes the unconstitutionality of the restriction.

Finally, when the principle of proportionality is considered, it is evident that not all of the regulations were necessary or proportional in a strict sense. An example of such restrictions is a prohibition of entering the woods or a prohibition of religious worship in public places.

References

A. Law acts

Act on the woods from 28 September 1991. (Ustawa z dnia 28 września 1991 r. o lasach (Dz.U. 1991 poz. 444)).

Act on preventing and combating infections and contagious diseases of people from 5 December 2008. (Ustawa z dnia 5 grudnia 2008 r. o zapobieganiu oraz zwalczaniu zakażeń i chorób zakaźnych u ludzi (Dz. U. 2008 nr 234 poz. 1570) wraz z ustawami zmieniającymi).

Act on legal solutions associated with preventing, countering and combating COVID-19, other diseases and crisis situation triggered by them, from 2 March 2020. (Ustawa z dnia 2 marca 2020 r. o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych (Dz. U. 2020 poz. 374) wraz z ustawami zmieniającymi).

Constitution of the Republic of Poland from 2 April 1997. (Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. (Dz.U.1997.78.483)).

Regulation of the Minister of Health on the announcement of the state of epidemic threat on the territory of Republic of Poland from 13 March 2020. (Rozporządzenie Ministra Zdrowia z dnia 13 marca 2020 r. w sprawie ogłoszenia na obszarze Rzeczypospolitej Polskiej stanu zagrożenia epidemicznego (Dz. U. 2020 poz. 433) wraz z rozporządzeniami zmieniającymi).

Regulation of the Minister of Health on the announcement of the state of epidemic on the territory of the Republic of Poland from 20 March 2020. (Rozporządzenie Ministra Zdrowia z dnia 20 marca 2020 r. w sprawie ogłoszenia na obszarze Rzeczypospolitej Polskiej stanu epidemii. (Dz. U. 2020 poz. 491) wraz z rozporządzeniami zmieniającymi).

Regulation of the Council of Ministers from 31 March 2020, on the establishment of certain limits, orders and bans in connection with the epidemic state. (Rozporządzenie Rady Ministrów z dnia 31 marca 2020 r. w sprawie ustanowienia określonych ograniczeń, nakazów i zakazów w związku z wystąpieniem stanu epidemii (Dz. U. 2020 poz. 566) wraz z rozporządzeniami zmieniającymi).

Regulation of the Council of Ministers from 10 April 2020, on the establishment of certain limits, orders and bans in connection with the epidemic state. (Rozporządzenie Rady Ministrów z dnia 10 kwietnia 2020 r. w sprawie ustanowienia określonych ograniczeń, nakazów i zakazów w związku z wystąpieniem stanu epidemii (Dz. U. 2020 poz. 658)).

Regulation of the Council of Ministers from 19 April 2020, on the establishment of certain limits, orders and bans in connection with the epidemic state. (Rozporządzenie Rady Ministrów z dnia 19 kwietnia 2020 r. w sprawie ustanowienia określonych ograniczeń, nakazów i zakazów w związku z wystąpieniem stanu epidemii (Dz. U. 2020 poz. 697)).

Regulation of the Council of Ministers from 2 May 2020, on the establishment of certain limits, orders and bans in connection with the epidemic state. (Rozporządzenie Rady Ministrów z dnia 2 maja 2020 r. w sprawie ustanowienia określonych ograniczeń, nakazów i zakazów w związku z wystąpieniem stanu epidemii (Dz. U. 2020 poz. 792)).

Regulation of the Council of Ministers from 16 April 2020, on the establishment of certain limits, orders and bans in connection with the epidemic state. (Rozporządzenie Rady Ministrów z dnia 16 maja 2020 r. w sprawie ustanowienia określonych ograniczeń, nakazów i zakazów w związku z wystąpieniem stanu epidemii (Dz. U. 2020 poz. 878)).

B. Legal comments

Tuleja, P. (Ed.). (2019). *Constitution of the Republic of Poland. Commentary*. Wolters Kluwer Polska.

Garlicki, L., & Zubik, M. (Eds.) (n.d.). *Constitution of the Republic of Poland. Commentary*. Wydawnictwo Sejmowe.

Haczkowska, M. (Ed.). (2014). *Constitution of the Republic of Poland. Commentary*. LexisNexis.

C. Other sources:

Marszałek-Kawa, J., & Plecka, D. (Eds.) (2019). *The Dictionary of Political Knowledge*. Wydawnictwo Adam Marszałek.

Śledzińska-Simon, A. (2019). *Analiza proporcjonalności ograniczeń konstytucyjnych praw i wolności*. E-wydawnictwo. Prawnicza i Ekonomiczna Biblioteka Cyfrowa.